

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 96-0067 ST
Sales and Use Tax
For The Tax Periods: 1991, 1992, and 1993

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales/Use Tax: Photocopying

Authority: IC 6-2.5-2-1, IC 6-2.5-4-1, IC 6-2.5-3-2, IC 6-2.5-5-3, IC 6-2.1-1-0.6,
IC 6-2.1-2-4(7), 45 IAC 2.2-4-27(d)(3)

Taxpayer protests the assessment of sales/use tax on its purchase of photocopying services.

II. Sales/Use Tax: Computer Software Upgrades

Authority: IC 6-2.5-3-2, 45 IAC 2.2-4-2, Sales Tax Information Bulletin #2

Taxpayer protests the assessment of sales/use tax on its computer software upgrades.

III. Sales/Use Tax: Telecommunication Services

Authority: IC 6-2.5-4-10

Taxpayer protests the assessment of sales/use tax on its purchase of telecommunication services.

STATEMENT OF FACTS

Taxpayer is engaged in the business of providing legal counsel and services. To conduct its business, taxpayer purchased copying services, telecommunication services, and software maintenance.

Additional facts will be provided as needed.

I. Sales/Use Tax: Photocopying Services

DISCUSSION

Pursuant to IC 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana. IC 6-2.5-4-1 provides that a retail transaction involves the transfer of tangible personal property. Pursuant to IC 6-2.5-3-2, “an excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.”

The taxpayer protests the assessment of use tax on its purchase of photocopying services provided by an on-site management services provider. The taxpayer’s contract with its vendor provides that the vendor will supply all equipment and personnel necessary to provide for the copying and duplicating needs. The vendor provides services of pick up and delivery, management of supplies, provision and maintenance of equipment, operation of copiers and related equipment by vendor’s employees, binding, copying, and billing.

Pursuant to IC 6-2.5-5-3 and IC 6-2.1-1-0.6, the Department assessed use tax based on the premise that taxpayer’s purchases of copies were purchases of commercial printing. These statutes define commercial printing as the production and manufacture of tangible personal property. Photocopying has been distinguished from commercial printing for income tax purposes pursuant to IC 6-2.1-2-4(7). Thus, the issues regarding the taxability of taxpayer’s purchase of copying services are (1) whether the tangible personal property received by taxpayer is incidental to the provision of services and (2) whether the taxpayer is liable for use tax for its rental of copying equipment.

In this case, the tangible personal property rendered in conjunction with services is incidental to the services received by the taxpayer. Before taxpayer entered into service agreements with vendors for copying services, taxpayer was equipped to provide its own duplicating and photocopying. Taxpayer contracted with management service vendors for copying services, not to purchase tangible personal property; the paper and ink transferred to the taxpayer are inconsequential compared with the services received by taxpayer.

Secondly, the taxpayer does not rent the copying equipment used by the vendor to produce copies for the taxpayer. Pursuant to taxpayer’s contracts with its vendor, the vendor provides the equipment and the personnel to operate the equipment. The following regulation describes the provision of services in conjunction with the rental of tangible personal property. Pursuant to 45 IAC 2.2-4-27(d)(3):

(A) The renting or leasing of tangible personal property, together with the services of an operator shall be subject to the tax when control of the property is exercised by the lessee. Control is exercised when the lessee has exclusive use of the property, and the lessee has the right to direct the manner of the use of the property. If these conditions are present, control is deemed to be exercised even though it is not actually exercised.

(B) The rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the

operator shall be considered the performance of a service rather than a rental or lease, provided the lessee cannot exercise control over such property and operator.

(C) When tangible personal property is rented or leased together with the service of an operator, the gross retail tax or use tax is imposed on the property rentals. The tax is not imposed upon the charges for the operator's services provided such charges are separately stated on the invoice rendered by the lessor to the lessee.

In this case, the vendor has control over the equipment. The vendor's personnel operate, maintain and supervise the duplication of documents for the taxpayer. The taxpayer maintains no exclusive control over the tangible personal property used by the vendor. Thus, taxpayer is not renting tangible personal property.

Taxpayer purchases a bundle of services from its vendor. The tangible personal property transferred to the taxpayer is incidental to the provision of these services. The taxpayer neither rents nor leases the equipment used to render these services since the taxpayer does not have exclusive control over this equipment; rather, the vendor operates and controls its equipment in order to provide copying services to the taxpayer. Taxpayer's purchases of copying services from its management services vendor are therefore not subject to tax.

FINDING

Taxpayer's protest is sustained.

II. Sales/Use Tax: Software Upgrades

DISCUSSION

Taxpayer protests the assessment of use tax on its purchase of an optional software maintenance agreement. Taxpayer argues purchasing a software maintenance agreement is the purchase of an intangible right to software updates that are not certain to be provided. Taxpayer argues that it is uncertain whether the updates will be provided; thus, the maintenance agreement is not subject to sales or use tax.

Sales Tax Information Bulletin #2 outlines the Department's treatment of optional maintenance agreements. Optional warranties and maintenance agreements are not subject to tax because the purchase of the warranty or maintenance agreement is the purchase of an intangible right to have property supplied and there is no certainty that property will be supplied. However, if the agreement includes a charge for property to be periodically supplied, the agreement is subject to tax. Thus, an optional warranty or maintenance agreement that entitles the purchaser to program updates is subject to tax.

It is not necessary that the taxpayer may be guaranteed to receive tangible personal property as part of the contract. It is sufficient that the taxpayer expects to receive tangible personal property without additional consideration.

FINDING

Taxpayer's protest is denied.

III. Sales/Use Tax: Telecommunication Services

DISCUSSION

Taxpayer purchased electronic data communication services. Taxpayer was assessed use tax on separately stated equipment charges in connection with its purchase of data communication services. Taxpayer argues that these equipment charges are not subject to use tax. Taxpayer argues that it did not acquire tangible personal property in the transaction.

However, in this case, the equipment charges were listed separately from the telecommunication service charges on taxpayer's invoices. Pursuant to IC 6-2.5-4-10, a person is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person. Pursuant to Sales Tax Information Bulletin #51T, when equipment charges are listed separately, it is presumed that tangible personal property is being rented or leased and therefore subject to tax. The Department finds that separately stated equipment charges are rental payments for tangible personal property and subject to tax.

FINDING

Taxpayer's protest is denied.